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SUCCESSORSHIP LAW: THE IMPACT ON BUSINESS TRANSFERS AND COLLECTIVE BARGAINING

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I. INTRODUCTION

An understanding of the impact of successorship law[1] on collective bargaining and business transfers necessarily requires consideration of the legal concepts defining successorship law under the national labor laws.[2] This article initially discusses the context in which successorship issues arise and then summarizes the legal principles evolving from National Labor Relations Board (Board), judicial and arbitral decisions defining successorship law.

The legal concepts distilled from various applications of successorship principles suggest that successor employers may avoid bargaining and contractual obligations by properly structuring business transfers. This article outlines the factors which the Board and the courts have considered when exempting a successor employer from its predecessor's labor obligations.

Because successor employers are able to avoid such obligations by properly utilizing successorship principles developed

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1. Successorship law has evolved primarily from decisions involving questions about the legal obligations of a new employer who acquires a business to the employees of the former employer or their collective bargaining representative. *See* Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 249, 262 n.9 (1974). The Court in *Howard Johnson* noted that the answers to these questions require an "analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc." *Id.* at 262-63 n.9.

2. Labor-Management Relations Act, 29 U.S.C. §§ 141-187 (1976), which amended the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1976).

in the case law, the thrust of union proposals during collective bargaining has been to incorporate into the collective bargaining agreement strong language purporting to bind successor employers to the agreement. Unions have negotiated successorship clauses[3] which place significant pressures on predecessor employers to condition business transfers on the purchaser's assumption of the agreement.

While numerous articles have been published on labor law successorship in general,[4] only a few have discussed the impact on business transfers of successorship clauses in collective bargaining agreements.[5] This article identifies and categorizes the various types of successorship provisions found in collective bargaining agreements and discusses the contractual obligations they impose on employers when the business is transferred.

The successorship concepts developed under the case law rightfully limit the unwarranted expansion of successor obligations. However, a review of collective bargaining agreements indicates that unions may accomplish contractually what they have been unable to achieve under the successorship doctrine. Contrary to case law requirements and authority, an increasing number of successor employers assume the predecessor's bargaining obligations and collective bargaining agreement because the predecessor is under contractual obligations which force this result. Such contractual provisions can seriously hamper, if not completely prevent, business transfers.

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3. There exists a variety of successorship provisions in collective bargaining agreements. The following provision is a typical example: "This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns." Comment, *Defining "Successors" and the Significance of a Successors and Assigns Clause in a Collective Bargaining Agreement*, 49 TUL. L. REV. 644, 644 n.2 (1975). *See also, e.g.*, Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 249, 251 (1974). An increasing number of agreements contain more extensive successorship provisions. *See infra* § V

4. *See, e.g.*, the "extremely limited sample" of articles listed in Comment, *The Successorship Doctrine: In Search of a New Focus*, 17 WILLAMETTE L. REV. 405, 407 n.3 (1981) (over twenty articles listed).

5. For articles that focus on successorship clauses in collective bargaining agreements, see Comment, *Successorship Clauses in Collective Bargaining Agreements*, 1979 B.Y.U. L. REV. 99; Comment, *supra* note 3. For brief discussions of successorship clauses see Severson & Willcoxon, *Successorship Under* Howard Johnson: *Short Order Justice for Employees*, 64 CALIF. L. REV. 795, 838-39 (1976); Slicker, *A Reconsideration of the Doctrine of Employer Successorship — A Step Toward a Rational Approach*, 57 MINN. L. REV. 1051, 1076-78 (1973).

II. The Contexts in Which Issues Arise

Successorship problems arise in a legal context which has been described as "shrouded in somewhat impressionist approaches."[6] More specifically, this context includes parties with conflicting interests, national labor laws with competing goals and a judiciary lacking congressional direction.[7]

A business transfer involves the conflicting interests of at least four different groups[8] which may be adversely affected by the transaction:

Individual Employees. Individual employees often view the business transfer as a threat to job security and contractually achieved rights.[9] Rights such as wages, seniority, vacations and pensions may be viewed by employees as akin to "vested" or property rights[10] and as such may be fiercely defended.

Employers. If employers are to remain in business, they must have the right to transfer capital freely and to exercise their prerogative to rearrange their businesses as they see fit. When a business is transferred, the succeeding employer frequently must change corporate structures, labor forces, work locations, task assignments and supervision in order to operate profitably. The United States Supreme Court has stressed that when the employer's right to make such changes is severely abridged, employers may be reluctant to take over failing businesses, with the result that the flow of capital in the free market may be inhibited.[11]

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6. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 299 (1972) (Rehnquist, J., concurring and dissenting) (quoting International Ass'n of Machinists v. NLRB, 414 F.2d 1135, 1139 (D.C. Cir. 1969) (Leventhal, J., concurring)).

7. *See* Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 249, 256 (1974).

8. Comment, *supra* note 4, at 406-07.

9. *See* Slicker, *supra* note 5, at 1052, where the author states:

> [T]he impact of change in employer identity often occurs without prior warning to employees and leaves them little, if any, opportunity to plan in its wake. Such a change may be peculiarly harsh for the individual employee since it is often accompanied by a reduction in pay or the loss of accumulated rights and benefits or even a loss of employment. Further, the employees' union choice and the continued vitality of any contract negotiated in their behalf with the employer are jeopardized by the employer change.

10. *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 545 (1964).

11. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 288 (1972).

Unions. Unions possess an "institutional interest[s]"[12] in continuing to represent their perceived share of employees in the labor market. The loss of bargaining units as a result of business transfers leads to a loss of membership and dues, threatening the union's interest in self-preservation. In some cases, two unions may be competing to represent the same group of employees after a business transfer.[13]

The Public. In order to accommodate the public interest in peaceful resolution of labor disputes, Congress enacted the National Labor Relations Act (Act)[14] to form the framework for legally resolving the competing interests of parties embroiled in such disputes. One major goal of the Act has been to achieve industrial peace by encouraging stability in labor relations.[15] But other fundamental policies of the Act include recognition of the right to freedom of contract and encouragement of the transfer and flow of capital in a free market.[16] Also, Congress has repeatedly shown itself "unwilling to purchase industrial peace" by curtailing the right of employees freely to choose who will represent their interests in dealings with their employer.[17]

Thus the Act creates tension between, on the one hand, the goals of industrial stability and the survival of contractual rights in collective bargaining agreements and, on the other, the goal of furthering deeply rooted traditions of freedom of contract and the free transfer of capital.[18] The Board has the initial responsibility for giving effect to the policies of the Act and balancing the interests of the parties in a particular labor

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12. Comment, *supra* note 4, at 407. The author discusses the interests of the union and the other groups involved in a labor dispute. *Id.* at 406-07.

13. *See, e.g.*, NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 279-80 (1972).

14. 29 U.S.C. §§ 151-168 (1976). *See also* Local 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411, 428 (1960), where the Court stated:

> [L]abor legislation traditionally entails the adjustment and compromise of competing interests which in the abstract or from a purely partisan point of view may seem irreconcilable. The "policy of the Act" is embodied in the totality of that adjustment, and not necessarily in any single demand which may have figured, however weightily, in it.

15. See statement of policy of Act in 29 U.S.C. § 151 (1976).

16. *See* NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 287 (1972).

17. *Id.* at 303 (Rehnquist, J., concurring and dissenting).

18. *Id.*

dispute.[19] Under this authority, the Board created the successorship doctrine to determine the legal obligations of the parties involved in a business transfer.

The basic principle of the successorship doctrine is that under certain conditions a succeeding employer may be required to recognize and bargain with the predecessor's collective bargaining representative. This is a practical approach to the problem that results when the succeeding employer is the only entity which survives the business transfer. Unfortunately for the parties involved, this practical problem was evidently unanticipated by Congress. The obligations of a successor employer are not specifically addressed in the text or the legislative history of the national labor laws.[20] Thus, the successorship doctrine has been created and its applications reviewed in the "absence of Congressional guidance."[21]

III. The Issues Involved

The Supreme Court has stated that the "real question" in any successorship case is: "[W]hat are the legal obligations of the new employer to the employees of the former owner or their representative?"[22] When the issues are analyzed in this fashion, there is no single definition of "successor" which is applicable in all legal contexts.[23] Rather, successorship issues are decided under "the traditional case-by-case approach of the common law."[24] Under this approach general successorship concepts must be distilled from cases decided under "myriad factual circumstances."[25] Despite the difficulty of this task, a few basic principles do exist which can assist in the resolution of the following issues:

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19. 29 U.S.C. § 153 (1976); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47 (1953).

20. Slicker, *supra* note 5, at 1053 n.3. The commentator notes that "[t]he problem of employer successorship first received congressional attention in the hearings which culminated in the recent amendments to the Service Contract Act, 41 U.S.C. § 351 (1970), which specifies minimum wage and fringe benefit standards in service contracts at government installations." *Id.* at 1053 n.2.

21. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 249, 256 (1974).

22. *Id.* at 262 n.9.

23. *Id.* at 263 n.9.

24. *Id.* at 256.

25. *Id.*

1. When is the successor employer required to recognize and bargain with the predecessor's union?

2. To what extent should the successor employer be bound by the predecessor's collective bargaining agreement?

From these issues flow numerous subsidiary issues,[26] many of which are beyond the scope of this article.

IV. Supreme Court Decisions Defining Successorship Concepts

Successorship concepts delimiting a successor employer's bargaining and contractual obligations have evolved primarily from three Supreme Court decisions: *John Wiley & Sons, Inc. v. Livingston*;[27] *NLRB v. Burns International Security Services, Inc.*;[28] and *Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel & Restaurant Employees*.[29]

A. Wiley

In *John Wiley & Sons, Inc. v. Livingston*[30] the Court considered the legal obligations of a new employer, John Wiley & Sons, Inc., after the old employer, Interscience Publishers, Inc., disappeared as a result of a merger. The union claimed that under section 301 of the Labor-Management Relations Act,[31] Wiley should be compelled to arbitrate the grievances

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26. Two examples of such issues are the Board's authority to require the successor employer to remedy the predecessor's unfair labor practices, *see, e.g.*, Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), and the successor employer's liability for Title VII unfair employment practices committed by its predecessor, *see, e.g.*, EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). Factual issues such as whether the successor employer has impliedly assumed the predecessor's collective bargaining agreement also arise in successorship cases. *See, e.g.*, Hospital Workers Local 250 v. Pasatiempo Dev. Corp., 627 F.2d 1011 (9th Cir. 1980); Local Joint Exec. Bd. v. Hotel Circle, Inc., 419 F Supp. 778 (S.D. Cal. 1976), *aff'd on other grounds*, 613 F.2d 210 (9th Cir. 1980).

27. 376 U.S. 543 (1964).

28. 406 U.S. 272 (1972).

29. 417 U.S. 249 (1974).

30. 376 U.S. 543 (1964).

31. 29 U.S.C. § 185(a) (1976). Section 185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

of the former Interscience employees under the collective bargaining agreement the union had with Interscience.

Prior to the merger, Interscience had eighty employees, forty of whom were represented by the union. Wiley was much larger than Interscience and had three hundred employees, none of whom was represented by a union.

At the time of the *Wiley* decision, the Board had already fashioned a successorship doctrine which required that under certain circumstances a new employer had to assume legal obligations incurred by the previous employer.[32] The first reported use of successorship concepts by the Board occurred in a case in which the Board issued remedial orders against a partnership that had committed unfair labor practices.[33] One of the partners subsequently died. The surviving partner continued to operate the business using the partnership name. Although the original partnership had ceased to exist, the Sixth Circuit Court of Appeals enforced the Board's order against the surviving partner, holding that in the "interest of industrial peace" the remedial provisions of the Act are intended to regulate not only individual employers but also the "employing industry"[34]

The Supreme Court recognized in *Wiley* that within the context of unfair labor practice complaints, the Board had previously required successor employers to recognize and bargain with the predecessor's union if the employing enterprise had continued to operate under the new ownership substantially as it had before.[35] However, the union had not claimed in *Wiley* that it had a right to continue to represent the employees and had only pursued its rights under section 301.

The union argued that Wiley had a duty to arbitrate the grievances filed under the collective bargaining agreement with Interscience. The Supreme Court agreed, noting that Wiley was also subject to state laws which imposed liability on the surviving corporation of a merger for the contractual obli-

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32. *See* NLRB v. Colten, 105 F.2d 179, 183 (6th Cir. 1939); Cruse Motors, Inc., 105 N.L.R.B. 242, 247 (1953).

33. NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939).

34. *Id.* at 183. The portion of the Board's order dealing with compensation for back pay was also enforced against the estate of the deceased partner.

35. 376 U.S. at 551 (citing, among others, Cruse Motors, Inc., 105 N.L.R.B. 242, 247 (1953)).

gations of the disappearing corporation. The decision relied primarily on the Court's longstanding preference for arbitration as the method for resolving industrial strife.[36] More importantly, however, the Court observed that the duty to arbitrate could exist in circumstances other than a merger situation where "one owner replaces another but the business entity remains the same."[37]

B. Burns

The Court again dealt with successorship questions in *NLRB v. Burns International Security Services, Inc.*[38] Factually *Burns* did not involve a succession to a business in the usual sense. But the Court utilized *Burns* to stem the tide of a series of circuit court and Board holdings which had greatly expanded the Court's position as stated in *Wiley*

Prior to the *Burns* decision, the Ninth Circuit Court of Appeals in a section 301 action had interpreted *Wiley* as authorizing the court to bind the successor to the predecessor's collective bargaining agreement.[39] Until the *Burns* case came before it, the Board had consistently held that successor employers who met certain criteria were only required to recognize and bargain with the union.[40] But with its decision in *Burns*, the Board expanded its position and held that Burns was bound by the predecessor's collective bargaining agreement.[41]

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36. *Id.* at 549.

37. *Id.*

38. 406 U.S. 276 (1972). Unlike the *Wiley* and *Howard Johnson* cases, which involved § 301 actions concerning the successor's duty to arbitrate under the predecessor's collective bargaining agreement with the union, *Burns* involved unfair labor practice violations filed under §§ 8(a)(1), 8(a)(2) and 8(a)(5) of the National Labor Relations Act. The Court in *Burns* was primarily concerned with the § 8(a)(5) violations. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a)(5) (1976). Section 159(a) provides that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. " 29 U.S.C. § 159(a) (1976).

39. Wackenhut Corp. v. United Plant Guardworkers, 332 F.2d 954, 958 (9th Cir. 1964). *Accord*, Joint Bd., Cloak, Skirt & Dressmakers Union v. Senco, Inc., 310 F Supp. 539 (D. Mass. 1970).

40. *Burns*, 406 U.S. at 284.

41. *Id.* at 285.

Burns became involved in the successorship dispute after it successfully bid and obtained a contract previously held by the predecessor to provide protection services for another employer. When Burns took over the contract, it hired twenty-seven of its forty-two employees from the predecessor's work force. Burns refused to recognize the union which had previously represented the predecessor's employees. Burns also refused to adopt the predecessor's contract with the union.

The Court held that Burns had a duty to recognize and bargain with the predecessor's union.[42] The Court relied heavily on the fact that a majority of Burns' employees came from the predecessor's work force and that work force had recently voted for the union.[43]

Significantly, however, the Court held that Burns *was not* required to adopt the predecessor's collective bargaining agreement.[44] It noted that section 8(d) of the Act specifically forbids the Board to impose any particular concession or agreement on the parties to a bargaining obligation.[45] Moreover, the Court noted that it was inadvisable as a matter of policy to require the successor employer in this situation to assume the existing collective bargaining agreement:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.[46]

Also significant was the Court's determination that a successor employer was free, with certain exceptions, to establish its own initial terms and conditions of employment.[47]

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42. *Id.* at 281.
43. *Id.* at 278.
44. *Id.* at 287.
45. *Id.* at 282.
46. *Id.* at 287-88.
47. *Id.* at 294.

C. Howard Johnson

The *Howard Johnson* case was decided in the context of a section 301[48] claim to compel arbitration. By the time the case came before the Supreme Court, the Board and the courts had developed a variety of criteria for determining if a new business continued to operate after a business transfer substantially as it had before the transfer.[49] The Court recognized a need to consolidate the successorship concepts developed in duty-to-bargain cases (*Burns*) with those developed in duty-to-arbitrate cases (*Wiley*).[50]

The Court also reacted to claims that the rights enjoyed by a new employer in a successorship context could depend on the union's choice of forum.[51] If a union pressed its successorship claim in the context of an unfair labor practice charge before the Board, the Board was limited under *Burns* to ordering the successor to recognize and bargain with the union. If a union pursued a section 301 action before the courts, a court could compel arbitration, and the arbitrator could find the successor employer bound by the predecessor's contract.[52] The Court was concerned that the principles established under *Burns* might be ignored in a section 301 action.[53]

In the *Howard Johnson* case, Howard Johnson purchased certain personal assets from the predecessor. It proceeded to operate the same type of business, a motel and restaurant, at the predecessor's location, but hired *only a small fraction* of the predecessor's employees.[54]

Unlike the *Wiley* and *Burns* cases, the predecessor had negotiated a collective bargaining agreement with the union which purportedly bound all "successors, assigns, purchasers, lessees or transferees"[55] to the agreement. At the time of purchase, Howard Johnson expressly refused to recognize the

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48. 29 U.S.C. § 185(a) (1976). For the text of this section see note 31 *supra*.

49. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 249, 258 (1974). *See also* Comment, *supra* note 4, at 411.

50. 417 U.S. at 254-56.

51. *Id.* at 256.

52. *See* United Steelworkers v. United States Gypsum Co., 492 F.2d 713, 725-27 (5th Cir. 1974).

53. 417 U.S. at 256.

54. *Id.* at 250 (emphasis added).

55. *Id.* at 251.

union or assume any labor agreements or any obligations resulting from such agreements.[56]

In contrast to the *Wiley* situation, the predecessor in *Howard Johnson* survived the business transfer and continued as a "viable entity" with substantial retained assets.[57] Also, the predecessor had previously agreed to arbitrate the extent of its liability under the collective bargaining agreement.

The Court held that Howard Johnson should not be compelled to arbitrate the union's claims, which were ultimately designed to force the company to hire the rest of its predecessor's employees. The Court identified the controlling factor for determining whether there was "substantial continuity" between the new business and the old as continuity "in the identity of the work force across the change in ownership."[58] The Court reiterated that a succeeding employer should not be required to hire a predecessor's work force and noted that a new work force could be hired if the employer did not discriminate against applicants because of their union affiliation.[59] Also significant was the Court's observation that the "mere existence" of a provision purporting to bind successors to the collective bargaining agreement did not compel arbitration or bind Howard Johnson to the substantive terms of the agreement.[60]

D Legal Principles Distilled from the Supreme Court Decisions

Several legal principles may be derived from the Supreme Court decisions discussed in the preceding section. These principles can assist employers in determining their legal obligations when a business transfer occurs.

1. Substantial Identity Between the Successor's and the Predecessor's Work Forces Is a Paramount Consideration.

A number of factors are looked to when determining whether an employer has the legal obligations of a "successor": use of the same facility; employment of the same super-

56. *Id.* at 251-52.
57. *Id.* at 257.
58. *Id.* at 263.
59. *Id.* at 261-62 & 262 n.8.
60. *Id.* at 258 n.3.

visors and work force; similarity of working conditions, equipment, methods, products, services and customers.[61] Also considered is whether there has been any hiatus or break in business operations after the transfer.[62] However, in light of *Howard Johnson*, it is clear that by far the most important factor is substantial continuity of the work force across the change in ownership.[63] The successor's hiring of a substantial portion of the precedessor's employees is a "major consideration" when determining if the successor has a duty to bargain or to arbitrate claims with the union.[64]

While it is agreed that continuity in the work force is necessary before legal obligations can be imposed upon successors, it remains unclear which work force should be used to measure "substantial continuity"[65] The analysis may depend on whether the obligation at issue is a duty to bargain or a duty to arbitrate.[66]

The Second Circuit Court of Appeals has observed that there is "no clear guidance from the Supreme Court" for determining the measuring work force when the issue is a successor's duty to bargain.[67] However, substantial agreement exists among at least five circuits that the appropriate test is whether a majority of the *successor's* bargaining unit work force is composed of the predecessor's employees.[68]

Less settled is the question of the measuring work force and the extent of employee transfer necessary (substantial or majority) when a successor's duty to arbitrate is in question.

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61. *See, e.g.*, Westwood Import Co., 251 N.L.R.B. 1213 (1980); Cablevision Systems Dev. Co., 251 N.L.R.B. 1319 (1980); Maintenance, Inc., 148 N.L.R.B. 1299 (1964).

62. Georgetown Stainless Mfg. Corp., 198 N.L.R.B. 234 (1972).

63. *See* 417 U.S. at 263.

64. Audit Servs., Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981).

65. Dynamic Mach. Co. v. NLRB, 552 F.2d 1195 (7th Cir. 1977). *See also* Comment, *supra* note 4, at 415 n.29.

66. 552 F.2d at 1204.

67. Saks & Co. v. NLRB, 634 F.2d 681, 685 (2d Cir. 1980).

68. Saks & Co. v. NLRB, 634 F.2d 681, 685 (2d Cir. 1980); NLRB v. Fabsteel Co., 587 F.2d 689, 695 (5th Cir. 1979); International Union of Elec., Radio & Mach. Workers v. NLRB, 604 F.2d 689, 695 (D.C. Cir. 1979); NLRB v. Middleboro Fire Apparatus, Inc., 590 F.2d 4, 8 (1st Cir. 1978); NLRB v. Band-Age, Inc., 534 F.2d 1, 4 n.6 (1st Cir. 1976); Zim's Foodliner, Inc. v. NLRB, 495 F.2d 1131, 1141-42 (7th Cir. 1974); Boeing Co. v. International Ass'n of Machinists & Aerospace Workers, 504 F.2d 307, 319 (5th Cir. 1974).

In *Boeing Co. v. International Association of Machinists & Aerospace Workers*,[69] the Fifth Circuit Court of Appeals concluded that duty-to-bargain decisions were unpersuasive on this issue and used the predecessor's employees as the measuring work force.[70] The court's discussion proceeded as follows:

> To begin with, the showing of employee continuity is relevant in establishing "the continuity of identity in the business enterprise." As a matter of principle, since the duty to arbitrate arises from an application of the contract between the predecessor employer and his organized employees, the entity whose identity is to be the reference point for judging continuity ought to be the predecessor enterprise. Accordingly, in judging the continuity in the identity of the work force, the incumbent component of the successor's work force ought to be compared against the predecessor's staff, not the successor's.[71]

Clearly the choice of the measuring work force can be determinative of the obligations to be imposed on the successor employer. This is especially true if there is a large disparity in size between the predecessor's and the successor's work forces.[72] The courts have avoided addressing this issue in their decisions by relying on facts which indicated that either all of the predecessor's employees were transferred[73] or so few were transferred[74] that resolution of these questions was unnecessary

2. The Legal Obligations of Successors Are Controlled by the Successor Doctrine Despite the Presence of a Successorship Clause in the Collective Bargaining Agreement.

Unless the successor employer adopts the predecessor's collective bargaining agreement, its legal obligations will depend on the concepts developed under the successorship doctrine. This is true even if the agreement contains a successor-

69. 504 F.2d 307 (5th Cir. 1974).

70. *Id.* at 319-20.

71. *Id.* at 319 (footnote omitted).

72. For example, in *Wiley* Interscience's work force of eighty merged with Wiley's work force of three hundred. 376 U.S. at 545.

73. *See, e.g.*, Audit Servs., Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981).

74. *See, e.g., Howard Johnson*, 417 U.S. at 259-60, 263-64.

ship clause purporting to bind "successors and assigns" to the agreement. The "mere existence" of such a clause does not compel arbitration or alter the principles established by the *Burns* case.[75]

3. Under the Act Successors Are Not Automatically Bound to Their Predecessors' Collective Bargaining Agreements.

Within the context of Board and judicial determinations, a successor's obligations with respect to its predecessor's collective bargaining agreement are primarily dictated by the principles adopted by the Court in *Burns*. Successors "are not bound by the substantive provisions of a collective bargaining agreement negotiated by their predecessors but not agreed to or assumed by them."[76] Relying on this principle, in decisions subsequent to *Burns* the Board has not found statutory violations when successor employers have refused to adopt the collective bargaining agreement unless the successor had agreed to assume the contract and subsequently reneged on this agreement.[77] Also, since the Supreme Court stressed in *Howard Johnson* that the *Burns* principles may not be ignored in section 301 cases, the trend among arbitrators has been to find successors not guilty of contract violations unless they have assumed the predecessor's collective bargaining agreement.[78]

Conversely, there are a few cases which indicate that some arbitrators and courts do not consider *Howard Johnson* as limiting an arbitrator's authority to bind a successor to terms of the contract. For instance, in *B & K Investments, Inc.*, the arbitrator in dicta interpreted some remarks in the court's opinion compelling arbitration as allowing him to bind an unconsenting successor to substantive provisions in the predecessor's collective bargaining agreement.[79] When compelling

75. *Id.* at 258 n.3; Bartenders Local 340 v. Howard Johnson Co., 535 F.2d 1160 (9th Cir. 1976).

76. 406 U.S. at 284.

77. *See, e.g.*, World Evangelism, Inc., 248 N.L.R.B. 909 (1980).

78. *See, e.g.*, Tri-State Asphalt Corp., 72 Lab. Arb. (BNA) 102 (1979) (LeWinter, Arb.); Shore Manor, Ltd., 71 Lab. Arb. (BNA) 1238 (1978) (Katz, Arb.); Darling & Co., 68 Lab. Arb. (BNA) 917 (1977) (Martin, Arb.); Mahoney Plastics Corp., 69 Lab. Arb. (BNA) 1017 (1977) (King, Arb.). *See also* Audit Servs., Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981), which relies on an assumption of contract theory.

79. B & K Invs., Inc., 71 Lab. Arb. (BNA) 366, 369 (1978) (Turkus, Arb.).

arbitration the court had expressly relied on the reasoning in the opinion of the Fifth Circuit Court of Appeals in *United Steelworkers v. United States Gypsum Co. (Gypsum II)*.[80] In that case, which was decided before *Howard Johnson*, the Fifth Circuit distinguished between the power of the Board and that of an arbitrator to bind a successor to a prior existing collective bargaining agreement. The arbitrator in *B & K Investments* noted that another Fifth Circuit opinion rendered subsequent to *Howard Johnson, Boeing Co. v. International Association of Machinists & Aerospace Workers*,[81] cited *Gypsum II* with approval. Therefore, he reasoned, the Fifth Circuit did not consider *Burns* to have overruled the principles of *Wiley*.[82]

A more appropriate inquiry might be whether the *Howard Johnson* decision, which applied the *Burns* principles in a section 301 context, in effect limited the principle stemming from *Wiley* that an arbitrator may bind a successor to its predecessor's collective bargaining agreement. So far the court decisions compelling arbitration and enforcing the arbitrator's award in the *B & K Investments* case represent the only judicial precedent which indicates that the arbitrator continues to have such unlimited authority.[83] It should noted that in *B & K Investments* the arbitrator ultimately concluded that the successor had assumed the predecessor's collective bargaining agreement.[84]

In *Schneier's Finer Foods, Inc.*,[85] an arbitrator relied on the Fifth Circuit's analysis of the impact of *Burns* on *Wiley* and concluded that his arbitral authority was "broader than that usually conferred in 'grievance' arbitrations."[86] Using his "broader" authority, the arbitrator required the successor to remedy the predecessor's breach of the successorship provi-

80. 492 F.2d 713 (5th Cir. 1974).

81. 504 F.2d 307 (5th Cir. 1974).

82. 71 Lab. Arb. at 369.

83. Local 1115 Joint Bd. Nursing Home & Hosp. Employees v. B & K Invs., Inc., 436 F Supp. 1203, 1208 (S.D. Fla. 1977) (compelling arbitration); Local 1115 Joint Bd. Nursing Home & Hosp. Employees v. B & K Invs., Inc., 100 L.R.R.M. 2174 (S.D.N.Y. 1978) (enforcing award). *See also* Comment, *supra* note 4, at 415-16.

84. 71 Lab. Arb. at 370.

85. 72 Lab. Arb. (BNA) 881 (1979) (Belkin, Arb.).

86. *Id.* at 888.

sion in the collective bargaining agreement.[87] Under this theory, the successor in effect became liable for the predecessor's contractual obligations.[88]

Finally, in *Standard Beverage Co.*,[89] the arbitrator ordered the successor to honor the predecessor's collective bargaining agreement, but it was to be applied only to those employees hired from the predecessor's work force. This case is arguably confined to its unique factual circumstances. In *Standard Beverage*, the same union had represented all of the predecessor's and the successor's employees before the transfer took place. Also, both parties had been covered by the same collective bargaining agreement.[90]

The *B & K Investments, Schneier's Foods* and *Standard Beverage* cases represent the exception rather than the rule. The weight of arbitral authority indicates the demise, or at least the severe limitation, of the principles stemming from *Wiley* granting the arbitrator unlimited authority to impose contractual obligations on successors.

E. Factors Considered When Determining the Successor Employer's Legal Obligations

While each case turns on its unique factual circumstances, the Board and the courts have considered the following factors when determining if a successor employer should be exempt from recognition and bargaining obligations toward the precedessor employer's union:

1. Cessation of operations for a significant period of time.[91]
2. Assumption of the predecessor's obligations and/or accounts receivable by the successor.[92]
3. Changes in name, traits, styles and logos.[93]
4. Changes in first-line and middle-level management, par-

87. *Id.* at 887.

88. *Id.* at 888.

89. 80-1 Lab. Arb. Awards (CCH) ¶ 8022 (1979) (Thornell, Arb.).

90. *Id.* at 3080.

91. *See, e.g.*, Radiant Fashions, Inc., 202 N.L.R.B. 938 (1973) (no successorship where hiatus of two and a half to three months occurred).

92. *See, e.g.*, N.L.R.B. v. Tempest Shirt Mfg. Co., 285 F.2d 1 (5th Cir. 1960) (successorship found where accounts receivable assumed); Radiant Fashions, Inc., 202 N.L.R.B. 938 (1973) (no successorship where purchaser did not assume accounts receivable).

93. *See, e.g.*, NLRB v. Downtown Bakery Corp., 330 F.2d 921 (6th Cir. 1964).

ticularly those involved in labor relations matters.[94]
5. Changes in business structure and operations.[95]
6. Changes in the work force.[96]
7. Purchase of assets, not liabilities.[97]
8. An express intention not to assume the labor contract that is stated in the sales agreement.[98]

V. Collective Bargaining Under Successorship Law

A. *The Current Trend*

Under successorship law, a successor employer may avoid its predecessor's recognition, bargaining and contractual obligations through proper structuring of the business transfer and subsequent operations. As a result, unions have adopted a

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94. *See, e.g.*, Thomas Cadillac, Inc., 170 N.L.R.B. 884 (1968), *aff'd sub nom.* International Ass'n of Machinists v. NLRB, 414 F.2d 1135 (D.C. Cir. 1969). *See also* Comment, *supra* note 4, at 471-72.

95. *See, e.g.*, Union Texas Petroleum, 153 N.L.R.B. 849 (1965) (no bargaining obligation found where the new employer planned to integrate the new business into its existing operations). In Georgetown Stainless Mfg. Corp., 198 N.L.R.B. 234 (1972), the trial examiner observed that the following criteria had evolved to determine whether the employing industry remained the same after a business transfer:

> (1) whether there has been a substantial continuity [in] the same business operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist [sic] under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same produce [sic] or offer [sic] the same services.

Id. at 236 (footnote omitted).

When applying the first criterion to the facts of the case the trial examiner found that no continuity in business operations existed since the succeeding employer had decided not to produce most of the products manufactured by the predecessor; where similar products did continue to be manufactured, they were sold to different customer markets.

96. *See, e.g.*, Southwestern Broadcasters, Inc., 255 N.L.R.B. No. 53, 106 L.R.R.M. 1340 (Mar. 26, 1981) (no successorship where the new employer failed to hire or indicate an intent to retain a majority of the predecessor's employees). One commentator has observed that "the Board has found successorship in only one case where such a majority did not exist." Slicker, *supra* note 5, at 1055 n.11 (citing Firchau Logging Co., 126 N.L.R.B. 1215 (1960)). *See also* United Maintenance & Mfg. Co., 214 N.L.R.B. 529, 536 n.21 (1974).

97. *See, e.g.*, Radiant Fashions, Inc., 202 N.L.R.B. 938 (1973) (significant that the succeeding employer purchased only the assets of one segment of an enterprise and did not assume any of the predecessor's liabilities except for the lease).

98. NLRB v. Burns Int'l Security Serv., Inc., 406 U.S. 272 (1972) (successor employers are under no obligation to assume the union's collective bargaining agreement).

new strategy They now seek to accomplish indirectly through collective bargaining agreements what they have failed to accomplish directly through judicial sanctions.

Within the collective bargaining agreement, unions attempt to establish contractual remedies which are unavailable under successorship law by negotiating for the inclusion of strong successorship language. Such language may:

1. Require predecessors to notify unions of pending business transfers.[99]
2. Require predecessors to notify successors of the predecessor's labor agreement.[100]
3. Force predecessors to condition business transfers on the successor's assumption of the collective bargaining agreement.[101]
4. Provide a basis for enjoining and preventing business transfers.[102]
5. Impose significant liabilities on predecessors for breach of successor provisions by the predecessor[103] or the successor.[104]
6. Effectively "pierce the corporate veil" by imposing personal liability on shareholders for breach of successor provisions.[105]

A review of collective bargaining agreements indicates that the various contractual obligations imposed on employers by successorship provisions may be broken down into essentially three categories: (1) no contractual obligations; (2) mild contractual obligations; (3) strong contractual obligations. Each of these categories and the corresponding successorship language is addressed separately in the following discussion.

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99. *See, e.g.*, Darling & Co., 68 Lab. Arb. (BNA) 917, 919 (1977) (Martin, Arb.).

100. *Id.*

101. *See, e.g.*, Roadway Express, 80-2 Lab. Arb. Awards (CCH) ¶ 8528 (1980) (Tamoush, Arb.).

102. *See, e.g.*, Teamsters Local 961 v. Graves Truck Line, Inc., 502 F Supp. 1292, 1294 (D. Colo. 1980).

103. *Id.*

104. *See, e.g.*, NLRB v. Hotel Employees, Local 531, 623 F.2d 61, 64 (9th Cir. 1980).

105. *See, e.g.*, Hosanna Trading Co., 74 Lab. Arb. (BNA) 128 (1980) (Simons, Arb.).

B. Successorship Provisions

1. No Contractual Obligations

According to a recent survey by the Bureau of National Affairs, seventy-one percent of the collective bargaining agreements reviewed contained no "successors and assigns" language.[106] This statistic does not mean, however, that employers should take union proposals for successorship provisions lightly The study revealed an increasing prevalence of such provisions in the contracts of four major employing industries: leather, utilities, transportation and furniture.[107] In these industries successorship provisions were present in at least fifty percent of the collective bargaining agreements.[108] Furthermore, the Board considers proposals for successorship language to be a mandatory subject of bargaining.[109] Employers should neither ignore nor willingly concede to union demands for successorship provisions.

It remains true, however, that collective bargaining agreements impose no contractual obligations on predecessors to condition business transfers on the successor's assumption of the contract when the contract includes no successorship language.[110] Employers may still find themselves burdened with undesired legal obligations, however, if boilerplate successorship language of this nature is placed in the *sales* agreement under which a business is transferred. The presence of such language in the sales agreement may be interpreted as indicating that the successor has in fact assumed the predecessor's labor relations obligations.[111] The prospective successor employer who desires to function with his own work force and to rearrange the business operations should therefore scrutinize the sales agreement for such boilerplate successorship language and should insist on its elimination from the agreement. If this course is followed, the successor employer will be free to structure its business operations so as to avoid incurring recognition and bargaining obligations toward the predeces-

106. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 36:5 (1976).
107. *Id.*
108. *Id.*
109. UMW (Lone Star Steel Co.), 231 N.L.R.B. 573, 575 (1977).
110. Decatur Herald & Review, Inc., 73 Lab. Arb. (BNA) 745 (1979) (Jones, Arb.).
111. Darling & Co., 68 Lab. Arb. (BNA) 917, 919 (1977) (Martin, Arb.).

sor's union under the successorship doctrine.

2. Mild Contractual Obligations

Collective bargaining agreements which impose relatively mild contractual obligations in the case of a business transfer may be of two types: (1) there may be only a brief mention of "successors and assigns" in the preamble of the agreement, or (2) the agreement may contain "successors and assigns" language which only implies rather than clearly imposes contractual obligations on the predecessor employer. In the second type of agreement, the successorship provisions are separately placed within the body of the agreement.

A clause typical of the first category of agreement is:

> This Agreement is made and entered into this 29th Day of March 1971, by and between CROWN CORK & SEAL COMPANY, INC., Plant No. 8, Atlanta, Georgia, or its successors, hereinafter referred to as the Company; and the GENERAL TEAMSTERS LOCAL UNION No. 528, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, or its successors, hereinafter referred to as the Union.[112]

Illustrative of the second category is the following clause:

> "This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be effected voluntarily or by operation of law or by merger or consolidation with another company provided the establishment remains in the same line of business."[113]

a. Successor Liability

As stated earlier, the "mere existence" of successorship language does not compel succeeding employers to bargain with or recognize the predecessor's union or to adopt its labor obligations. The successor employer may properly structure

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112. 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) 70:181 (1976).

113. Howard Johnson Co. v. Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees, 417 U.S. 249, 266 n.2 (1974) (quoting Detroit Local Joint Exec. Bd., Hotel & Restaurant Employees v. Howard Johnson Co., 482 F.2d 489, 491 (6th Cir. 1973).

the business takeover and thereby avoid such obligations under successorship law.[114] If the employer can accommodate its business needs to this structuring, it will not be obligated to bargain or arbitrate with the union.

b. *Predecessor Liability*

The lack of clear obligatory successorship language does not relieve predecessors of all liability if the successor does not assume the collective bargaining agreement. The predecessor's liability under these circumstances turns upon the construction given to the relevant language. The most crucial issue which arises concerning agreements with mild successorship language is whether the language is strong enough to impose a contractual obligation on the predecessor to insist that the successor adopt the contract as a condition of sale.

In *Howard Johnson*, the Supreme Court indicated that an injunctive remedy could lie under the relatively mild successorship language in the predecessor's bargaining agreement.[115] Unions have successfully enjoined and prevented business transfers under successorship provisions which read as follows:

> 1. This Agreement shall be binding upon the parties, their successors and assigns.[116]
> 2. This Agreement shall be equally binding on the Employer and its successors and assigns, and it is the intent of the parties that this Agreement shall remain in effect for its full term and bind the successors of the respective parties.[117]

Those cases submitted for arbitral determination of the effect of relatively mild successorship language yield conflicting results. There is arbitral authority which holds that a reference to "successors and assigns" in the contract preamble does not

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114. *See supra* § IV-E.

115. 417 U.S. at 258 n.3. *See also* Local No. 1266, Int'l Ass'n of Machinists & Aerospace Workers v. Panoramic Corp., 109 L.R.R.M. 2169 (7th Cir. 1981), a recent decision in which the Seventh Circuit Court of Appeals upheld the district court's injunction of a sale pending arbitration based on a reference to "successors" in the preamble of the collective bargaining agreement.

116. Local 1115 Joint Bd. Nursing Home & Hosp. Employees v. B & K Invs., Inc., 436 F Supp. 1203, 1206 (S.D. Fla. 1977).

117. Schneier's Finer Foods, Inc., 72 Lab. Arb. (BNA) 881, 881 (1979) (Belkin, Arb.). See discussion of temporary restraining order issued on the basis of the successorship language. *Id.* at 883.

impose rights or obligations on the parties involved.[118] The language is considered as having no force and effect and is regarded as "boilerplate" which at the most signifies the parties' willingness to have the successor assume the agreement if it desires to do so.[119] Arbitrators who view the language in this light have refused to impose an affirmative duty on the predecessor employer to insist on the successor's adoption of the collective bargaining agreement.[120]

Conversely, there is also arbitral authority which gives effect to references to "successors" in the preamble of the collective bargaining agreement.[121] However, this view should not prevail because it conflicts with well-established principles of arbitration which prohibit arbitrators from adding new or different provisions to the collective bargaining agreement.[122] This view may also conflict with the grievance provision in the agreement, which may expressly bar the arbitrator from adding provisions to the agreement.[123]

The cases in which arbitrators have interpreted the effect of "mild" successorship provisions placed separately in the collective bargaining agreement have also yielded conflicting results. For example, there is arbitral authority which holds that the following successorship provision obligates the predecessor to condition the sale of its business upon the successor's assumption of the collective bargaining agreement: " 'This Agreement shall be equally binding on the Employer and its successors and assigns, and it is the intent of the parties that this Agreement shall remain in effect for its full term and bind the successors of the respective parties.' "[124]

The arbitrator in *Schneier's Foods* considered the clause just quoted to be a "clear and unambiguous" expression of the

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118. *See, e.g.*, Storer Broadcasting Co., 78-1 Lab. Arb. Awards (CCH) ¶ 8087 (1978) (Ellman, Arb.).

119. *Id.*

120. *Id.*

121. *See* Storer Broadcasting Co., 78-1 Lab. Arb. Awards (CCH) ¶ 8087 (1978) (Ellman, Arb.), which discusses a decision by Arbitrator Keefe giving effect to a reference to "successors" in a contract preamble.

122. Decatur Herald & Review, Inc., 73 Lab. Arb. (BNA) 745, 754 (1979) (Jones, Arb.).

123. *Id.*

124. Schneier's Finer Foods, Inc., 72 Lab. Arb. (BNA) 881, 881 (1979) (Belkin, Arb.); National Tea Co. (1973) (Teple, Arb.) (unpublished award).

parties' intent.[125] However, it should be noted that in *Schneier's Foods* the purchasing employer met the case law definition of a successor with bargaining obligations.[126] Based on this factual distinction, the argument can be made that a different result is warranted if the purchaser does not meet that definition because it has implemented the steps outlined earlier in this article. The arbitral precedent only establishes that the contractual "successors and assigns" language is operative for employers who are "successors" under the case law.

Thus, predecessor employers can structure business transfers under collective bargaining agreements with relatively mild obligatory successorship language with a minimum of risk of liability Some risk is involved, however, in two respects: (1) the predecessor does not control the succeeding employer's conduct and therefore cannot control whether or not it will meet the case law definition of a "successor," and (2) the arbitrator might not limit the meaning of the "successors and assigns" language.

A predecessor's success in avoiding liability under these circumstances may depend on the forum and the timing of the union's challenge to the business transfer. If the union selects the grievance/arbitration forum after the sale, the purchasing employer would have had adequate time to structure its operations to establish indicia that it is not a "successor." However, if the union enjoins the sale before the transfer then the potential buyer and the predecessor may be unable to persuade a court that the contemplated structural and organizational plans would make the imposition of successor obligations inappropriate. Further, a court may be more impressed with the contractual language cited by the union than with unsubstantiated claims of nonsuccessorship presented by the employer.

It may be concluded that collective bargaining agreements with relatively mild successorship language present potential liabilities for the employers involved. However, these liabilities may be avoided in some cases by properly structuring the business transfer.

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125. 72 Lab. Arb. at 885.
126. *Id.* at 886-87.

3. Strong Contractual Obligations

Collective bargaining agreements increasingly contain successorship provisions which impose express duties on predecessor employers contemplating business transfers. The following provisions extracted from arbitration awards and a court decision have created substantial liabilities for predecessor employers:

> 1. In the event the entire operation or rights only, are sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such operation or use of such rights shall continue to be subject to the terms and conditions of this Agreement for the life thereof.
>
> * * *
>
> In the event the Employer fails to require the purchaser, transferee, or lessee to assume the obligations of this Agreement, the Employer shall be liable to the Local Union and to the employees covered for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, but shall not be liable after the purchaser, the transferee or lessee has agreed to assume the obligations of this Agreement.[127]
>
> 2. New Owner — This Agreement shall be binding upon the successors and assigns of the parties hereto. In the event of a bona fide sale or transfer of any store covered by this Agreement during the period hereof, the new owner or such transferee shall be notified of the obligation of this Agreement and be required to become a party hereto. The former owner shall be required to meet any and all monetary benefits that employees have accumulated up to the time of sale or transfer under this Agreement.[128]
>
> 3. "68. SALE OR TRANSFER OF BUSINESS. The parties agree that this agreement shall be binding upon the Association, the members of the Association and the Union and their respective transferees, successors and assigns, and that they will faithfully comply with its provisions.
>
> In the event that a member of the Association sells or transfers the business or the shop, such member shall neverthe-

127. Teamsters Local 961 v. Graves Truck Line, Inc., 502 F Supp. 1292, 1296 (D. Colo. 1980).

128. Roadway Express, 80-2 Lab. Arb. Awards (CCH) ¶ 8528 at 5359 (1980) (Tamoush, Arb.).

> less continue to be liable for the complete performance of this agreement until the purchaser or transferee expressly agrees in writing with the Union that it is fully bound by the terms of this agreement."[129]

a. Successor Liability

Notwithstanding strong language like that in the examples above, the succeeding employer who is not a "successor" under the case law incurs little risk by refusing to adopt contracts containing such language, for the reasons discussed in previous sections of this article.[130] If the succeeding employer is a "successor," then under some arbitral precedent[131] it may be required to remedy the predecessor's breach of the contract. This could result, in effect, in the adoption of the collective bargaining agreement by the successor.

b. Predecessor Liability

The predecessor's liability for violating strongly worded successorship provisions is clear. Such provisions have been interpreted as unequivocally requiring a sale or transfer to be conditioned upon the adoption of the contract regardless of whether or not the purchaser is legally a successor. It is highly unlikely that any sale or transfer of a business under such an agreement could be consummated unless it was conditioned upon the adoption of the predecessor's contract.

In the case of the first example given above of a strongly worded successorship provision, the union obtained a preliminary injunction which enjoined the business transfer even though the would-be successor technically "assumed" the agreement. The assumption would have resulted in a Board unit clarification dispute, and the court concluded that the arbitrator should decide before the transfer whether the assumption would conform with the agreement.[132]

Under the second provision, the predecessor was found in breach of the successorship clause even though the entire bar-

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129. Hosanna Trading Co., 74 Lab. Arb. (BNA) 128, 131 (1980) (Simons, Arb.).

130. *See supra* § V-B-2-a.

131. Schneier's Finer Foods, Inc., 72 Lab. Arb. (BNA) 881, 883 (1979) (Belkin, Arb.).

132. Teamsters Local 961 v. Graves Truck Lines, Inc., 502 F Supp. 1292 (D. Colo. 1980).

gaining unit had been laid off prior to the sale. The arbitrator concluded that the layoffs were a subterfuge to avoid the successorship provision and ordered the grievants made whole under the collective bargaining agreement until it expired on July 1, 1982, or until the successor assumed the agreement.[133]

In the case of the third example given above, the arbitrator interpreted the successorship provision as imposing a continuing obligation on the predecessor to perform the agreement if the successor did not expressly agree to assume the contract.[134] The predecessor was prevented from transferring the business to a new owner who indicated he would refuse to honor the agreement but would recognize another union.[135]

These types of successorship provisions essentially restrict business transfers to those parties who will agree to adopt and ultimately comply with the union's collective bargaining agreement. These strongly worded successorship clauses have been attacked as "hot cargo" provisions which violate sections 8(e) and 8(b)(4)(B) of the Act.[136] However, the clauses have consistently survived these attacks because, in all but one case,[137] employers have been unable to establish that the sale of assets met the "doing business" requirements under section 8(e).[138] The Board has not considered the sale or transfer of

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133. Roadway Express, 80-2 Lab. Arb. Awards (CCH) ¶ 8528 (1980) (Tamoush, Arb.).

134. Hosanna Trading Co., 74 Lab. Arb. (BNA) 128, 131 (1980) (Simons, Arb.).

135. *Id.*

136. *See, e.g.*, District No. 71, Int'l Ass'n of Machinists (Harris Truck & Trailer Sales) 224 N.L.R.B. 100 (1976).

Section 8(e) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

29 U.S.C. § 158(e) (1976). The Board has interpreted this section as prohibiting employers and unions from entering into either express or implied agreements (so-called hot cargo clauses) to cease doing business with other persons. Hotel & Restaurant Employees, Local 531, 237 N.L.R.B. 1204 (1978).

137. National Maritime Union v. Commerce Tankers Corp., 457 F.2d 1127 (2d Cir. 1972).

138. *See* UMW (Lone Star Steel Co.), 231 N.L.R.B. 573 (1977); District No. 71, Int'l Ass'n of Machinists (Harris Truck & Trailer Sales), 224 N.L.R.B. 100 (1976); Operating Eng'rs, Local 701 (Tru-Mix Constr. Co.), 221 N.L.R.B. 751 (1975). For the

a business enterprise to be a business transaction. Rather, it is viewed as a substitution of one entity for another while the business continues.[139] Therefore, the argument that strong successorship clauses constitute hot cargo provisions which violate the Act has not been successful for clauses restricting sales transfers,[140] although it does have merit for employers whose successorship provisions restrict leasing arrangements.[141]

An analysis of the language and a review of the case law interpreting strongly worded successorship provisions indicates that predecessor employers who are hamstrung by these provisions have few options. One possibility is to forego planned transfers until the contract terminates, but under these circumstances the employer must ensure that the successorship clause does not survive the contract's termination. A second option is to renegotiate the successorship provision.

VI. Conclusion

Through the use of successorship concepts the courts have effectively balanced the interests of the parties involved in a business transfer. Under the case-by-case approach the particular factual circumstances are analyzed so as to balance the interests of the unions, employees, employers and the public in a way that effectuates the policies of the national labor laws. Strongly worded successorship provisions destroy any opportunity to weigh the interests of the parties since these clauses traditionally represent only the union's interests. Employers must avoid such provisions or their presence in a collective bargaining agreement may effectively prevent the sale or transfer of the business. Furthermore, successorship language, whether mild or strong, should be cautiously interpreted by courts and arbitrators, since the unwarranted expansion of remedies available to unions in a successorship context may inhibit the transfer of capital in a free market.

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text of § 8(e) see *supra* note 136.

139. *See* cases cited *supra* note 138.

140. *See* Chicago Dining Room Employees, Local 42, 248 N.L.R.B. 604, 606 n.4 (1980).

141. *Id.*